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INTERNATIONAL COUNTERTRADE

Draft Legal Guide on International Countertrade Transactions

Report of the Secretary-General

Addendum

II. SCOPE AND TERMINOLOGY OF LEGAL GUIDE

Contents

		Paragraphs
A.	Transactions covered	1-6
B.	Focus on issues specific to countertrade	7-8
C.	Governmental regulations	9-10
D.	Universal scope of Legal Guide	11
E.	Terminology	12-28
	1. Varieties of countertrade	13-17
	2. Parties to countertrade transaction	18-22
	3. Countertrade transaction and its elements	23-28

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[Editorial note: The present draft chapter II is a revision of draft chapter II bearing the same title and published in document A/CN.9/332/Add.1. The note in square brackets at the beginning of each paragraph indicates either the number under which the paragraph appeared in document A/CN.9/332/Add.1 or that the paragraph is new. The revisions of paragraphs that appeared in A/CN.9/332/Add.1 are underlined. An asterisk indicates the place where text has been deleted without adding new language.]

A. Transactions covered

1. [1] Countertrade transactions covered by the Legal Guide are those transactions in which one party supplies goods, services, technology or other economic value to the second party, and, in return, the first party purchases from the second party an agreed amount of goods, services, technology or other economic value. A distinctive feature of these transactions is the existence of a link between the supplies in the two directions in that the conclusion of the supply contract or contracts in one direction is conditioned upon the conclusion of the supply contract or contracts in the other direction. When the parties enter into contracts in opposite directions without expressing such a link between them, the contracts, as regards contractual rights and obligations of the parties, cannot be distinguished from straightforward independent transactions. Therefore, the Legal Guide deals only with transactions that express in a contractual form such a link between the contracts constituting the countertrade transaction.

2. [new paragraph] For the sake of simplicity, the Legal Guide refers only to "goods" as the subject-matter of countertrade transactions. However, the dicussion in the Guide on transaction involving goods is generally applicable also to transactions involving services. The Guide can be used as a broad guidance also for transactions involving technology. In some instances the Guide makes particular reference to services or to technology.

3. [new paragraph] The Legal Guide discusses primarily countertrade transactions in which the goods are delivered across national boundaries. Countertrade transactions in domestic trade may have features that are not considered in the present Guide. Nevertheless, to the extent domestic transactions fall within the varieties of countertrade transactions described herein, the Legal Guide can be used by parties to those transactions.

4. [2] Countertrade transactions take a variety of forms and display differing features depending upon the particular circumstances of the transaction. The differences concern such matters as the contractual structure of the transaction (i.e., the number and sequence of the component contracts), whether goods supplied in one direction are to be used in the production of goods to be supplied in the other direction, the manner of payment, and the number of parties involved in the transaction.

[3]*
[4]*

5. [5] Another aspect of the variety of countertrade transactions is the degree of interest the parties may have in the different segments of a countertrade transaction. In many transactions one of the parties is

interested primarily in the export of its own goods rather than in acquiring goods from the other party. In other transactions, the parties consider the supply of goods in the two directions as being in their mutual interest. There are also transactions in which, at the outset of the transaction, a party perceives a commitment to conclude future contracts as a concession to the other party, but subsequently comes to regard that commitment as a benefit. *

6. [new paragraph] In most instances, the dicussion in the Legal Guide is relevant generally to various types of countertrade. However, in some contexts the discussion indicates that it is only relevant to a particular type of countertrade.

B. Focus on issues specific to countertrade

[Editorial note: in draft chapter II as it appeared in A/CN./9/332/Add.1, this section appeared as section C, paragraphs 24 to 26. Some of the substance of paragraphs 25 and 26 (A/CN.9/332/Add.1) was moved to draft chapter III, "Contracting approach" (A/CN.9/362/Add.3).]

7. [new paragraph] The Legal Guide focuses on the drawing up of contractual clauses that are specific to or of particular importance for international countertrade. Such clauses are contained in an agreement of the parties that establishes a link between the supply of goods in one direction and the supply of goods in the other direction. That agreement is, as explained below in paragraph 24, referred to in the Legal Guide as the "countertrade agreement".

8. [24] As a rule, the Legal Guide does not deal with the content of the contracts for individual supplies of goods under a countertrade transaction since those contracts generally resemble contracts concluded as discrete and independent transactions. In some cases, however, the content of a contract is affected by the fact that it forms part of a countertrade transaction. For example, when the proceeds of a contract in one direction are to be used to pay for the contract in the other direction, the two supply contracts may contain payment provisions particular to countertrade. To the extent clauses specific to countertrade may be inserted in those contracts, the Legal Guide considers them.

C. Governmental regulations

[Editorial note: in draft chapter II as it appeared in A/CN./9/332/Add.1, this section appeared as section D, paragraphs 27 and 28.]

9. [27] In some countries countertrade is subject to governmental regulations. Such regulations, which may derive from international agreements, are closely linked with national economic policies and as a result vary from country to country and are likely to be changed more often than rules of contract law. Governmental regulations may promote or restrict countertrade in a variety of ways. For example, it may be provided that certain types of imports must be paid for only through a countertrade

arrangement, that state trading agencies are to explore the possibility of countertrade when negotiating certain types of contracts, that certain types of local products are prohibited from being offered in countertrade, or that an exporter goods and the foreign purchaser are not free to agree that the resulting payment claim will be settled in a way other than by transferring foreign currency to the exporter's account. Other such rules may relate to exchange controls or to the authority of an administrative organ to approve a countertrade transaction. Some regulations may be specifically oriented to countertrade; others may be more general, but with an impact on countertrade (e.g., competition law, export and import regulations, foreign exchange rules). Some regulations are directed to one contracting party only and do not directly affect the content or the legal effect of the contract concluded by that party. In other instances the regulation may limit the parties' freedom of contract.

10. [28] The Legal Guide advises parties to take into account such governmental regulations. Since the regulations are disparate and are often changed, advice is given, where appropriate, in the form of a caveat rather than in any detailed discussion of the substance of the applicable regulations. Further discussion on mandatory governmental regulations is contained in chapter XIV, "Choice of law", paragraphs to .

D. Universal scope of Legal Guide

[Editorial note: in draft chapter II as it appeared in A/CN./9/332/Add.1, this section appeared as section E, paragraph 29.]

11. [29] Private law questions involved in international countertrade transactions and the motives for engaging in countertrade do not reveal regional particularities. To the extent there exist regional differences in contract practices, they concern in particular the frequency of use of certain commercial types of countertrade and the elaborateness and refinement of contractual solutions. Consequently, the Legal Guide treats the legal issues arising from countertrade at the universal level.

E. Terminology

[Editorial note: in draft chapter II as it appeared in A/CN./9/332/Add.1, this section appeared as section B, paragraphs 8 to 23.]

12. [29] Terminology used in practice and in writings to describe countertrade transactions and the parties involved in them varies greatly. A prevailing terminology has not developed. The following paragraphs establish a terminology used in the Legal Guide for different varieties of countertrade transactions, parties and contracts in countertrade.

1. Varieties of countertrade

13. [new paragraph] The terms used in the Legal Guide to denote different types of countertrade are explained below. Countertrade transactions are distinguished in the Legal Guide on the basis of their commercial or technical

features and their contractual structure. It should be noted that classifications other than the one explained below exist.

14. [10] Barter. In practice the term "barter" is used with different meanings. The term may refer, for example, to countertrade transactions in general, to an intergovernmental agreement addressing mutual trade in particular goods between identified partners, or to countertrade in which trans-border flow of currency is eliminated or reduced or where a single contract governs the mutual shipments of goods. The Legal Guide uses "barter" in a strict legal sense to refer to a contract involving a two-way exchange of specified goods in which the supply of goods in one direction replaces, entirely or partly, the monetary payment for the supply of goods in the other direction. Where there is a difference in value in the supply of goods in the two directions, the settlement of the difference may be in money or in other economic value.

15. [11] Counter-purchase. This term is used to refer to a transaction in which the parties, in connection with the conclusion of a purchase contract in one direction, enter into an agreement to conclude a sales contract in the other direction, i.e., a counter-purchase contract. Counter-purchase is distinguished from buy-back in that the goods supplied under the first purchase are not used in the production of the items sold in return.

16. [12] Buy-back. This term refers to a transaction in which one party supplies a production facility, and the parties agree that the supplier of the facility, or a person designated by the supplier, will buy products resulting from that production facility. The supplier of the facility often provides technology and training and sometimes component parts or materials to be used in the production.

17. [13] Offset. Transactions referred to in the Legal Guide as offsets normally involve the supply of goods of high value or technological sophistication and may include the transfer of technology and know-how, promotion of investments and facilitating access to a particular market. Two types of offset transactions may be distinguished. Under a "direct offset" the parties agree to supply to each other goods that are technologically or commercially related (e.g., component parts or products that are marketed together). A direct offset can contain features of a buy-back transaction (i.e., transfer of production equipment and technology, and purchase by the transferor of the resulting products). The difference between such a direct offset and a buy-back transaction is that in a direct offset both parties commit themselves to purchase over a period of time goods from each other, whereas under a buy-back transaction the party that has supplied the production facility commits itself to purchase goods resulting from the production facility. Such direct offsets are sometimes referred to as industrial participation or industrial co-operation. The expression "indirect offset" typically refers to a transaction where a governmental agency that procures, or approves the procurement of, goods of high value requires from the supplier that counter-purchases are made in the procuring country or that economic value is provided to the procuring country in the form of investment, technology or assistance in third markets. The counter-export goods are not technologically related to the export goods (i.e., they are not components of the export goods, as in direct offset, and they are not resultant products of the facility provided under the export contract, as in buy-back). The governmental agency often stipulates guidelines for the offset, for example,

as to the industrial sectors or regions that are to be assisted in such a way. However, within such guidelines, the party committed to counter-purchase or to providing such assistance is normally free to choose the contracting partners. A countertrade transaction may involve elements of both direct and indirect offset transactions.

2. Parties to countertrade transaction

18. [18] Purchaser, supplier or party. The Legal Guide frequently uses the term "purchaser", "supplier" or "party" to refer to parties purchasing and supplying goods in a countertrade transaction. These terms are employed when the discussion in the Guide is relevant both to a situation in which contracts are to be concluded in a particular sequence (chapter III, "Contracting approach", paragaraphs 13 to 19) and to the situation in which the parties agree to conclude contracts in the two directions without stipulating a particular sequence of conclusion (chapter III, paragraphs 20 and 21). This terminology is also used when the contracts for the supply of goods in the two directions are concluded concurrently *. When reference is made to a party who is committed to purchase or supply goods but has not yet done so, the Legal Guide may use the terms "party committed to purchase goods" and "party committed to supply goods" to make it clear that a contract has not been concluded yet.

19. [14] Exporter or counter-importer. The term "exporter" or "counter-importer" is used for the party who is - under the first contract to be concluded - the supplier, i.e., the exporter, of goods, and who has entered into a commitment with the other party to purchase, i.e., to counter-import, other goods in return. One or the other term is used depending on the context in which the party is mentioned. It should be noted that in some countertrade transactions the exporter and the counter-importer are the same party, while in others the exporter and counter-importer are different parties.

20. [15] Importer or counter-exporter. The term "importer" or "counter-exporter" is used for the party who is - under the first contract to be concluded - the purchaser, i.e., the importer, of goods, and who has entered into a commitment with the other party to supply, i.e., to counter-export, other goods in return. One or the other term is used depending on the context in which the party is mentioned. As in respect of the exporter and the counter-importer, in some countertrade transactions the same party is the importer and the counter-exporter. Sometimes, however, one party imports and another party counter-exports.

21. [16] In some writings on countertrade the term "exporter" is used to denote the party from an economically developed country, who often supplies goods of technological content that normally cannot be obtained in the other party's country. The term is used in those writings irrespective of whether the "exporter" supplies first and agrees to purchase later or whether the "exporter" makes an "advance purchase" from the other party in order to enable that other party to raise funds needed for a subsequent purchase of goods from the "exporter". The term "importer" is used in those writings to denote the party from a developing country. To underline that meaning, such writings may use terms such as "primary" or "western exporter" or "developing country importer".

22. [17] A distinction based on economic or regional considerations is not used in the present Legal Guide. One reason is that the guide covers both

intra-regional and inter-regional countertrade. Thus, distinctions used in discussions of inter-regional countertrade, in which the issues tend to be considered primarily from the perspective of one of the parties, would not be suitable since the Legal Guide advises both parties whatever may be their relative economic strength or background. Furthermore, terms based on the time sequence of the conclusion of contracts are more suitable since, for the purpose of discussing the contractual role and interests of parties, the question of primary significance is whether the party has already sold its goods and has promised to purchase goods from the other party, or whether the party, having purchased goods, has not sold its goods yet.

3. Countertrade transaction and its elements [change of title]

23. [23] Countertrade transaction. This term is used to refer to the whole countertrade arrangement containing the related supply contracts in the two directions and any countertrade agreement. The terms "countertrade agreement" and "supply contract" are explained below.

24. [19] Countertrade agreement. The countertrade agreement is the term used in the Legal Guide for the basic agreement which sets forth stipulations concerning the manner in which the countertrade transaction is to be implemented. In practice, agreements setting forth such stipulations are referred to by a variety of names, such as "frame agreement", "countertrade protocol", "umbrella agreement", "memorandum of understanding", "letter of undertaking", or "counterpurchase agreement". In many countertrade transactions the main purpose of the countertrade agreement is to set out the commitment of the parties to enter into the future contracts required to fulfil the objective of the transaction ("countertrade commitment", see the following paragraph). In addition to the countertrade commitment, the countertrade agreement is likely to contain clauses dealing with the terms of the contract to be concluded and clauses designed to support the fulfilment of the countertrade commitment; such clauses may address issues such as the type, quality and quantity of the goods, price of the goods, time period of fulfilment of the countertrade commitment, payment, restriction on resale of goods, participation of third persons in the transaction, liquidated damages or penalties, security for performance, failure to complete the countertrade transaction, choice of law, and settlement of disputes. The countertrade agreement may be embodied in a discrete instrument or it may be included in a contract for the shipment of goods. When the parties agree simultaneously on the terms governing the supply of all the goods in both directions, the countertrade agreement would contain a stipulation expressing the link between the concluded contracts and possibly other stipulations, but would not contain a countertrade commitment.

25. [20] Countertrade commitment. This term is used to refer to the commitment of the parties to enter into a future contract or contracts. Depending on the circumstances, those future contracts may relate only to the shipment in one direction or to the shipments in both directions. The degree to which the countertrade commitment is definite depends on the amount of detail contained in the countertrade agreement concerning the terms of the future contracts.

26. [22] Supply contracts. This term is used to refer generically to contracts for the supply of goods in one or in both directions. It may be used where no clear criterion exists for distinguishing between the "exporter"

and "importer", where the discussion does not make it necessary to take into account a particular sequence of conclusion of contracts between the parties, or where the context requires a general reference to a contract for the supply of goods in either direction.

27. [21] Export, import, counter-export, and counter-import contracts. When the Legal Guide discusses transactions in which the parties can be referred to as "exporter", "importer", "counter-exporter" or "counter-importer" (see above, paragraphs 19 and 20), the supply contracts forming part of the transaction would be referred to by names consistent with the names of the parties, i.e., "export" or "import" contract for the first contract entered into, and "counter-export" or "counter-import" contract for the contract entered into subsequently. The contracts in each direction might be referred to in the singular even though there may be several such contracts on both sides of the countertrade transaction.

28. [new paragraph] Goods. The subject-matter of a transaction may include various types of merchandise (such as manufactured goods or raw materials), services (such as maintenance, repair, transport, construction, tourist services, consulting, training), transfer of technology, or in some cases, a combination of these elements. As mentioned above in paragraph 2, for the sake of brevity, the Legal Guide generally refers only to "goods" as the subject-matter of countertrade transactions.